BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New Rule I and the amendment of ARM 37.40.302, 37.40.307, 37.40.311, and 37.40.347 pertaining to Medicaid nursing facility reimbursement	)))))	NOTICE OF AMENDMENT

TO: All Interested Persons

1. On April 24, 2008, the Department of Public Health and Human Services published MAR Notice No. 37-438 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules, at page 783 of the 2008 Montana Administrative Register, issue number 8.

2. The department is not adopting New Rule I at this time.

3. The department is not amending ARM 37.40.302, 37.40.311, and 37.40.347 at this time.

4. The department has amended the following rule as proposed with the following changes from the original proposal. New matter to be added is underlined. Matter to be deleted is interlined.

<u>37.40.307 NURSING FACILITY REIMBURSEMENT</u> (1) through (3) remain as proposed.

~~(4) For unit of government facilities as defined in ARM 37.40.302, the provider's interim and final payment rates shall be as provided in [RULE I].~~

~~(5)~~ <u>(4)</u> For ICF/MR services provided by nursing facilities located within the state of Montana, the Montana Medicaid program will pay a provider as provided in ARM 37.40.336.

~~(6)~~ <u>(5)</u> In addition to the per diem rate provided under (2) or the reimbursement allowed to an ICF/MR provider under ~~(5)~~ <u>(4)</u>, the Montana Medicaid program will pay providers located within the state of Montana for separately billable items, in accordance with ARM 37.40.330.

(7) through (13) remain as proposed but are renumbered (6) through (12).

AUTH: <u>53-2-201</u>, <u>53-6-113</u>, MCA
IMP: <u>53-6-101</u>, 53-6-111, 53-6-113, MCA

5. The department has thoroughly considered all commentary received. The comments received and the department's response to each follow:

<u>COMMENT #1</u>: This proposed rule set implements federal regulations which may become effective May 29, 2008, unless congressional action is taken to further delay

them. Because under the federal regulations, the reimbursement for providers who are units of government cannot exceed actual costs, the department proposed that an interim rate be established based on the provider's most recently filed annual cost report indexed to the midpoint of the rate year or the rate established under ARM 37.40.307, whichever is less.

We recommend that the "interim" rate effective July 1, 2008, be the price-based rate established under ARM 37.40.307, even though that rate may be higher than the rate established using the cost report indexed forward. Our rationale is that under the price-based system, the state has determined what the reasonable cost of a day of nursing home care is, consistent with economy and efficiency. Each facility should receive that rate and be allowed to have access to those funds to spend during the course of the rate year. If a unit of government facility fails to report costs on its cost report for the period involved that are equal to the rate that was paid, the state has the opportunity to recover the overpayment. If a facility receives an interim rate that is lower than the price based rate, they are at a disadvantage because they will have to spend money they are not receiving in order to receive the rate that all other facilities are receiving and that the state itself has determined is an appropriate, cost effective rate. We believe this is still in keeping with the federal requirement that units of government not be paid more than their costs since your proposed rule provides for a final rate determination after the rate year is complete and also provides for recovery of overpayments. This simply allows every facility to have equal access to the price-based rate and to have the opportunity to spend it on Medicaid services to residents during the rate year.

RESPONSE: The House and Senate have recently proposed an extended moratorium on the provider cost limit for units of government and the U.S. Department of Health and Human Services (HHS) is voluntarily delaying implementation until August 1, 2008. The department has decided to delay implementation of the unit of government provisions as outlined in the proposed notice of the rule at this time. The department will set payment rates for 2009 in accordance with the current rate methodology without the cost limits. If the final units of government rules are adopted by the Centers for Medicare and Medicaid Services (CMS), or if the moratorium is not extended beyond August 1, 2008 to comply with federal requirements, the department will renotice the unit of government rule provisions at a later date. Therefore, the language related to the units of government rule that were in the proposed rule notice is not being adopted at this time.

COMMENT #2: It is unclear under this and other provisions dealing with unit of government facilities whether they will be eligible to participate in the rate adjustment for county funded rural nursing facilities. This proposal should be clarified to assure that unit of government facilities may receive funding from this program (1) up to the Medicare UPL, as long as that does not result in payments in excess of their actual costs, or (2) up to their costs (if higher than the UPL).

RESPONSE: The department intends that facilities will still be allowed to participate in the at risk payment program to the extent federal law allows. Limits for units of government would be subject to cost and limits for nonunits of government will be subject to the Medicare upper payment limit (UPL). However, as noted in the response to comment #1, the unit of government provisions are not being adopted at this time.

COMMENT #3: The department's justification of the proposed rules states that the rule changes and limitations related to unit of government facilities will not be implemented if CMS is prevented by Congress from implementing the regulations. We recommend the content of the regulations themselves include appropriate language that states that Rule I, and the changes to ARM 37.40.302 (definitions), 37.40.307, 37.40.311, and 37.40.347 (as those changes relate to unit of government facilities) will not be implemented (or will be repealed) if Congress takes action to again delay the federal rules that are the basis of these regulatory changes. Such language must be clear that if Congress acts before July 1, 2008, the rules will not be implemented, and also, if Congress passes retroactive legislation after July 1, that the state will retroactively repeal the unit of government provisions of this proposal.

RESPONSE: The House and Senate have recently proposed an extended moratorium on this provider cost limit as units of government and HHS is voluntarily delaying implementation until August 1, 2008. The department has decided to delay implementation of the unit of government provisions at this time. The department will set payment rates for 2009 in accordance with the current rate methodology without the cost limits. If the final units of government UPL rules are adopted, or the moratorium is not extended beyond August 1, 2008 to comply with federal requirements, the department will renotice the unit of government rule provisions at a later date. They are not being adopted at this time.

COMMENT #4: The department's justification of the proposed rules and the spreadsheets provided by the department anticipate 1,165,000 days of care paid by Medicaid for state fiscal year 2009. Actual days for the current year are estimated at 1,107,582. Days have been declining each year since the late 1990s. The Medicaid days used by the department reflect a 5% increase at a time of declining occupancy. We urge the department to reduce the patient days to the current year's estimate of 1,107,582. Since days are likely to continue to decline, this should not create an inappropriate risk on the part of the department. The result of taking this action will be to more properly allocate the legislative appropriation. This will help to achieve a rate that is closer to the actual cost of providing care to Medicaid recipients and will help to assure facilities are able to continue to provide high quality care.

RESPONSE: The department cannot adjust the rate sheet to reflect the 1,107,582 days for rate calculation purposes as these days are lower than the expected utilization for the rate period. These days are not complete and are not an accurate reflection of the actual utilization that will occur during the rate year. These days are used to prorate the expected utilization of Medicaid days by each provider during the coming rate year based on past utilization history. The department will look to make adjustments in the days used in the rate sheet to more accurately reflect current utilization patterns.

COMMENT #5: We are concerned about the unit of government implementation impact on our facility. While the "lesser of" principle for paying the per diem does protect the individual facility from a potential future overpayment situation, this could also be done by using the cost based rate or price based rate whichever is higher. This would achieve the 100% of cost limit to the individual facilities. An alternative would be to use the "lesser of" for the interim payment and then base the future final cost on the actual cost report for the year involved not to exceed the defined 100% of cost. This approach does not penalize the government entity and reinforces CMS' intent for the rule.

The proposed rule creates two payment systems in Montana, one for government entities and one for nongovernment entities. We recommend recognition that the result of this rule will be creation of two Medicaid payment systems over time, one for government entities and one for the remaining nursing facilities. Continue the price based system for all nursing facilities. Modify the rule to make the government entity Medicaid payment system as follows: (1) the interim rate as in the rule using the lesser of price base versus most recent indexed cost report per diem. (2) Set final rate at the 100% of cost report per diem as identified in the final cost report. This approach simplifies the amount of data a government entity needs to track each year.

RESPONSE: The changes to the administrative rules related to Nursing Facility Reimbursement and Rate Adjustment for County Funded Rural Nursing Facilities are the result of incorporating federal law changes at 42 CFR Parts 433, 447, and 457. The federal regulations provide that only units of government are able to participate in the financing of the nonfederal share of Medicaid expenditures and limiting health care providers operated by units of government to Medicaid reimbursement levels that do not exceed the cost of providing covered services to eligible Medicaid recipients. This cost limitation for units of government applies to the rate adjustments made through the "at risk" payment methodology as well as to the total calculated Medicaid rate set through the nursing facility reimbursement methodology.

The House and Senate have recently proposed an extended moratorium on the unit of government provider cost and HHS is voluntarily delaying implementation until August 1, 2008. The department has decided to delay implementation of the unit of government provisions as outlined in the first notice of the rule at this time. The department will set payment rates for 2009 in accordance with the current rate methodology without the cost limits. If the final units of government UPL rules are adopted, or the moratorium is not extended beyond August 1, 2008 to comply with federal requirements, the department will renotice the unit of government rule provisions at a later date. The language is not being adopted at this time.

6. The rule changes are effective July 1, 2008.

/s/ John Koch
Rule Reviewer

/s/ Joan Miles
Director, Public Health and
Human Services

Certified to the Secretary of State June 16, 2008.